STATE OF NORTH DAKOTA SUPREME COURT

CITIBANK Plaintiff and Appellee, vs. SARAH REIKOWSKI, Defendant and Appellant	)))))))))	Supreme Court No. Unassigned APPELLANT'S BRIEF District Court No.: 04-C-510

APPEAL FROM THE DISTRICT COURT OF STUTSMAN COUNTY

SOUTHEAST JUDICIAL DISTRICT

DISTRICT COURT NUMBER 04-C-510

THE HONORABLE MIKAL SIMONSON

APPELLANT'S BRIEF

Charles Dendy
Attorney for Plaintiff/Appellee
Johnson, Rodenburg & Lauinger
1004 East Central Avenue
Bismarck, ND 58501-1936

Sarah Reikowski - Hart
Defendant/Appellant
Pro-se
3305 101st Ave SE
Spiritwood, ND 58481

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in its ruling that the Defendant's Answer was not on a timely basis, due to the fact that it was not accompanied by the appropriate filing fee.

2. Did the District Court err in denying the Defendant's Motion to Reconsider the Decision to Have the Default Judgment Remain in Effect.

3. Did the District Court err in granting a Judgment by Default, when the Defendant submitted an Answer and Affirmative Defense as requested by the District Court.

4. Is it better to try a case on its merit, rather than enter a Judgment by Default.

5. Did the District Court misuse its discretion when awarding the Default Judgment, when an answer and several appearances were made by the Defendant.

6. Should District Court display leniency to parties acting Pro Se in regards to the Rules of Civil Procedure.

TABLE OF AUTHORITIES

CASE LAW

STATEMENT OF THE CASE

This is a Civil Case originating in the Stutsman County District Court. The Defendant, Sarah Reikowski-Hart, hereinafter referred to as Sarah, was originally sued by the Plaintiff Citibank, in a collection matter of an alleged credit card debt. Citibank alleges Sarah entered into a contract with them and also states that there is no copy of said contract available. These allegations are addressed in Sarah's Answer and Affirmative Defense, filed on December 27, 2004. Defendant alleges that the Plaintiff has violated the Fair Debt Collections Practices Act, and thus is entitled to damages outlined in it.

STATEMENT OF FACTS

I received a letter dated April 20, 2004 from Johnson, Rodenburg & Lauinger which alleged a debt. In my May 2, 2004 letter, I promptly requested that they validate this alleged debt by providing me a contract and full statement of account. The first communication I received after my request for validation was a summons and complaint

sent by Lisa Lauinger of Johnson, Rodenburg & Lauinger. This clearly violates the Fair Fair Debt Collection Practices Act. Lisa Lauinger proceeded with debt collection measures before my request to validate the account was even answered. This is violation #1 of the FDCPA. I then received a letter dated August 16, 2004 which was a generic print out sheet totaling $13612.45. This sheet fails miserably to provide a full statement of account and/or any information on the basis of these totals. I then received a letter dated September 22, 2004 which stated that there was no contract available. Next I received a letter dated October 13, 2004 which contained a motion for judgment. This is clearly another attempt to collect a debt, once again while my request for validation was not fulfilled. This is violation #2 of the FDCPA.

I denied each and every allegation, statement and matter contained in the Plaintiff's Complaint, including those allegations contained in paragraphs 1, 2, 3 and 4. I deny these statements based on the following facts: 1. Plaintiff fails to state dates on which goods and/ or services were provided, nor does it state what goods/services were provided. 2. Plaintiff refers to an account agreement, while Plaintiff admits there is none present. 3. Plaintiff has failed to validate this debt as dictated by the Fair Debt Collections Practices Act. 4. Plaintiff refused to forward a copy of a signed contract and full statement of account.

Citibank violated the Fair Debt Collections Practices Act by refusing to provide verification/validation of the alleged debt and continuing collection efforts. Damages

entitled by the FDCPA are in the amount of $1,000.00 plus costs, per incident.

The Plaintiff did not submit my answer along with their summons and complaint to the District Court. The court did not receive my answer and entered a Judgment by Default on October 14, 2004. I then filed a Motion to Vacate the Judgment by Default, which was granted in the December 6, 2004 order by the Honorable Mikal Simonson, providing I serve and file and Answer by December 27, 2004.

On December 27, 2004 I promptly brought my answer to the Clerk of District Court window in the Stutsman County Courthouse, checkbook in hand. I found that the office was not staffed, but the adjacent window was. The staff from that window asked if they could help me. I said I need to speak to Irene. She then informed me that Irene was not in the office. I then stated that my answer was due today. The nice lady then looked up my name/case in the computer and confirmed that my response was due today. I submitted my answer and then asked if that was all she needed. She said she thought there was an answer fee, but she was not sure and no one was there that she could ask at that time. She then took a note paper and put my name and number on it and said she'd have somebody contact me about the fee.

Irene Williams did contact me at a later date and told me there was a filing fee of $50 due. While my husband had some business to conduct at the Clerk of Court's office, I had him ask Irene if there was a form available to get those fees waived for me. Irene then notified him of the Petition for Waiver of Fees. I promptly filed those requests. At no time was I

informed that I needed to write a $50 check for my answer to be considered. As a matter of fact, I volunteered payment on December 27, 2004 when I filed my answer to the summons and complaint.

On December 31, 2005 I filed the Petition of Waiver of Fees and an Affidavit in Support of the Petition of Waiver of Fees. The Honorable Mikal Simonson ruled that the Answer I submitted was not on a timely basis since it was not accompanied by the required filing fee. This decision was submitted on January 5, 2005.

On January 6, 2005, I submitted a Motion to Reconsider the Decision to Have the Default Judgment Remain in Effect. This was considered and found to be without merit on January 26, 2005 by the Honorable Mikal Simonson, no reason given. The Stutsman County District Court did however accept and cash the $50 check I submitted for the filing fee.

ARGUMENT

1. THE DISTRICT COURT ERRED IN ITS RULING THAT THE DEFENDANT'S ANSWER WAS NOT ON A TIMELY BASIS, DUE TO THE FACT THAT IT WAS NOT ACCOMPANIED BY THE APPROPRIATE FILING FEE.

The defendant filed the Answer on December 27, 2004 as ordered by the Honorable Mikal Simonson. The fee was not collected at that time, because the Deputy Clerk was not available and the court staff instructed the Defendant to wait for their call, which was on a later date. Even if the fee was filed as instructed by the District Court Staff, it would

have been past the December 27, 2004 date. The fee was submitted by check accompanying the January 6, 2005 Motion to Reconsider the Decision to Have the Judgment by Default Remain in Effect. The defendant followed the instructions given by the District Court Staff and was subsequently denied her right to answer, file motions, and defend herself in the civil case brought against her. Furthermore, the December 6, 2004 order from the Honorable Mikal Simonson stated, "the default judgment is vacated provided the defendant serves and files an answer by December 27, 2004." I submitted and the court received my answer by that date. It does not state that the answer would not be considered valid if it wasn't accompanied by a filing fee. Which should really be considered irrelevant since the court did collect a filing fee from me anyway.

2. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO RECONSIDER THE DECISION TO HAVE THE DEFAULT JUDGMENT REMAIN IN EFFECT.

The facts outlined in the Motion revealed human err. As previously stated, the Defendant followed the District Court Personnel instruction and was denied the right to defend herself. With this information brought to the Honorable Mikal Simonson's attention, along with the fact that the Defendant is acting Pro Se, he should have granted the Motion to Reconsider, Vacated that Default Judgment, and tried the case on its merits. After all, trying the case on its merits is what the Honorable Mikal Simonson prefers as indicated in his December 6, 2004 Order. The Supreme Court upholds this preference as indicated in

Svard v. Barfield, 291 N.W. 2d. 434 (N.D. 1980). Stating that an answer is not timely, because it was filed by the due date and the court accepted its requested filing fees, does not seem like a fair reason to grant a default judgment and uphold it when asked to reconsider it. Default Judgments should be reserved for instances where the allegations are uncontested. This matter is clearly contested by the Defendant.

3. THE DISTRICT COURT ERRED IN GRANTING THE JUDGMENT BY DEFAULT WHEN THE DEFENDED SUBMITTED AN ANSWER AND AFFIRMATIVE DEFENSE AS REQUESTED BY THE DISTRICT COURT.

Refusing to accept a defendant's answer because she followed a District Court Personnel's instruction inhibits justice. Granting a Default Judgment, when an answer is present, versus trying a case on its merits goes against the Court's own opinion and preferences.

4. IT IS BETTER TO TRY A CASE ON ITS MERIT, RATHER THAN ENTER A JUDGMENT BY DEFAULT.

The District Court previously stated that trying a case on merit is preferred to entering a default judgment. That being the case, when an answer is present, the court should not consider it without merit. The District Court erred in granting a Judgment by Default the second time. The best interest of justice is not served by that decision.

5. DID THE DISTRICT COURT MISUSE ITS DISCRETION WHEN IT AWARDED A DEFAULT JUDGMENT WHEN AN ANSWER AND SEVERAL APPEARANCES WERE MADE BY THE DEFENDANT.

The North Dakota Supreme Court has long held the opinion that each case should be decided upon its merits. This was expressed in Perdue v. Sherman, 246 N.W. 2d 491 (N.D. 1976):

> "We have often expressed a strong preference for having cases tried upon their merits. Sioux Falls Construction Co. v. Dakota Flooring, 109 N.W. 2d 244 (N.D. 1961); Azar v. Olson, 61 N.W. 2d 188 (N.D. 1953). It is also the policy of our courts to treat applications to reopen default judgments somewhat more leniently than applications to reopen judgments entered after contested trials. City of Wahpeton v. Drake-Henne, Inc., 228 N.W. 2d 324 (N.D. 1975)."

The District Court clearly erred when it granted a default judgment, ruled the answer was not timely, and then ruled the motion to reconsider without merit. These prior cases have clearly set the precedent for handling these issues.

6. THE DISTRICT COURT SHOULD DISPLAY LENIENCY TO PARTIES ACTING PRO SE, IN REGARDS TO THE RULES OF CIVIL PROCEDURE.

When a suit is brought against a party who cannot afford an attorney, and must defend themselves, a little lenience and understanding should be granted during proceedings. An error should be explained and overlooked, not exploited by the opposing party. It would be a serious blow to justice if any defendant was denied their day in court to defend themselves, because the answer was filed timely and the court received its filing fee after the amount was communicated. Especially when that fee was filed as requested by the District Court Personnel.

CONCLUSION

The Motion to Reconsider the Decision to have the Judgment by Default Remain in effect should be overturned. The District Court's Judgment by Default should be vacated. The Answer and Affirmative Defenses should be accepted by the District Court. The proceedings should commence, with the time limits reset, so the Defendant and Plaintiff may file any motions, objections and/or counterclaims they wish. The District Court should display leniency towards the rules and parties acting pro se, especially when the best interest of justice is at stake. The District Court should then consider the Petition For Waiver of Fees and waive them as requested, and hence refund the $50 already collected from the Defendant. The reopening of this case will ensure that the Defendant can submit evidence, question the Plaintiff's evidence, have the counterclaim heard, and have a verdict entered based on the merits of the case.

Respectfully Submitted March 14, 2005.

Sarah Reikowski - Hart
Defendant/Appellant
Pro-se
3305 101st Ave SE
Spiritwood, ND 58481

Subscribed and sworn to before me March 14, 2005.

(SEAL)